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LEGAL MEMO

**TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR,
MONTANA ASSOCIATION OF REALTORS**
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: SB0345 BILL MEMO
DATE: JANUARY 29, 2007

PURPOSE AND DISCLAIMER

You have asked me to prepare a brief memo regarding some of the potential impacts and policy implications of SB0345. This is provided below. Please note that this is a draft memo and additional impacts may become apparent through testimony and further research.

BILL NUMBER: SB0345

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING SETBACK REQUIREMENTS FOR CERTAIN STREAMS; REQUIRING POLITICAL SUBDIVISIONS TO ESTABLISH SETBACK REGULATIONS; AUTHORIZING POLITICAL SUBDIVISIONS TO ISSUE VARIANCES AND COLLECT FEES; AUTHORIZING POLITICAL SUBDIVISIONS TO ADOPT LOCAL REGULATIONS IN LIEU OF STATE STANDARDS THAT MEET CERTAIN REQUIREMENTS; PROVIDING FOR ENFORCEMENT AND PENALTIES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Stream Legacy Act".

MSK Comments: None needed.

NEW SECTION. Section 2. Intent, findings, and policy. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Stream Legacy Act. It is the legislature's intent that the requirements of [sections 1 through 10] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and

degradation of natural resources.

(2) The legislature finds that:

(a) impacts of development on Montana's rivers and streams, including increased downstream erosion and diminished water quality, are often manifested across local government jurisdictional boundaries;

(b) the state has a duty and legitimate interest in protecting the integrity of its rivers and streams on behalf of all its citizens;

(c) the state has a duty and legitimate interest in protecting people and private property by reducing property loss from flooding and erosion;

(d) maintenance of the integrity of rivers and streams is crucial to the quality and quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use;

(e) rivers and streams are highly susceptible to impacts from land development;

(f) fish and wildlife that rely on rivers and streams for habitat belong to all Montanans;

(g) development practices on lands adjacent to rivers and streams in many cases are causing excessive and unnecessary damage to the banks, beds, and protective vegetation of the state's rivers and streams; and

MSK Comments: I'd like to see the evidence supporting the use of the terms: "many cases"; and "excessive and unnecessary damage".

(h) through careful management of the lands adjacent to rivers and streams, property owners and developers can achieve their goals without sacrificing water quality or impairing the beneficial uses of the water.

(3) The legislature recognizes that Montana's rivers and streams provide important natural resources that belong to the people of the state and that support the economy, the environment, and the quality of life that Montanans enjoy. It is the policy of the state to ensure that development along rivers and streams proceeds in a way that:

(a) protects property from flooding and erosion;

(b) protects water quality and quantity;

(c) provides opportunities for recreation;

(d) protects valuable water recharge areas;

(e) preserves fish and wildlife habitat; and

(f) preserves the use and enjoyment of private property.

MSK Comments: While nothing in this section is regulatory, it remains important because it will be used by the courts to interpret and apply the specific regulatory language below. See also my comments to Section 8. (3)(c), page 7.

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Note 1: Protecting "fish and wildlife habitat" and "recreational opportunities" is on equal footing with "preserving" the use of private property.

Note 2: Is there a legal difference between "preserve"; "protect"; and "provide"? Will the courts find one?

NEW SECTION. Section 3. Definitions. When used in [sections 1 through 10], unless a different meaning clearly appears from the context, the following definitions apply:

- (1) "Flood plain" has the meaning provided in 76-5-103.
- (2) "Person" means an individual, firm, partnership, company, commercial entity, corporation, or association.
- (3) "Political subdivision" means any incorporated city or town, a consolidated government, or a county.
- (4) "Setback" means an area of varying width adjacent to a stream where certain uses have the potential to significantly affect private property, wildlife habitat, water quality, fish, or other aquatic resources. Setbacks may not be smaller than the vegetative buffer.
- (5) "Tier I streams" includes the following streams as defined by the United States geological survey:
 - (a) Beaverhead River;
 - (b) Big Hole River;
 - (c) Bighorn River;
 - (d) Bitterroot River;
 - (e) Bitterroot River, West Fork;
 - (f) Blackfoot River;
 - (g) Boulder River as it flows through Jefferson County;
 - (h) Boulder River as it flows through Park and Sweet Grass Counties;
 - (i) Clark Fork River;
 - (j) Clark's Fork of the Yellowstone River;
 - (k) Clearwater River;
 - (l) Dearborn River;
 - (m) East Gallatin River;
 - (n) Flathead River;
 - (o) Flathead River, Middle Fork;
 - (p) Flathead River, North Fork;
 - (q) Flathead River, South Fork;
 - (r) Gallatin River;
 - (s) Jefferson River;
 - (t) Jocko River;

- (u) Judith River;
- (v) Kootenai River;
- (w) Little Blackfoot River;
- (x) Madison River;
- (y) Marias River;
- (z) Milk River;
- (aa) Missouri River;
- (bb) Musselshell River;
- (cc) Poplar River;
- (dd) Powder River;
- (ee) Red Rock River;
- (ff) Rock Creek as it flows through Missoula and Granite Counties;
- (gg) Rock Creek as it flows through Carbon County;
- (hh) Ruby River;
- (ii) Shields River;
- (jj) Smith River;
- (kk) Stillwater River as it flows through Park and Stillwater Counties;
- (ll) Stillwater River as it flows through Lincoln and Flathead Counties;
- (mm) Stillwater River, West Fork, as it flows through Sweet Grass and Stillwater Counties;
- (nn) Sun River;
- (oo) Swan River;
- (pp) Teton River;
- (qq) Thompson River;
- (rr) Tongue River;
- (ss) Whitefish River;
- (tt) Yaak River; and
- (uu) Yellowstone River.

(6) "Tier II streams" means perennial streams that are direct tributaries of tier I streams and that drain an area 25 square miles or greater.

MSK Comments: I'd like to see a map of the area included by tier II streams. I'll check with DNRC.

(7) "Vegetative buffer" means the portion of the setback closest to the stream that is designated to remain undisturbed.

MSK Comments: What does "undisturbed" mean? Is mowing of the vegetative buffer allowed?

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NEW SECTION. Section 4. Setback regulation jurisdiction. (1) With the exception of [section 9], the provisions of [sections 1 through 10] do not apply to:

(a) incorporated cities and towns;

(b) unincorporated entities established prior to [the effective date of this act] that are classified as census-designated places by the United States bureau of the census, are within the boundary of a metropolitan sanitary sewer district created pursuant to 7-13-111, and are served by that metropolitan sanitary sewer district;

MSK Comments: I'll check and see what this definition may include.

Evergreen perhaps?

(c) zoned areas with regulations established on or before [the effective date of this act] that have residential densities of at least 1 unit per acre and are served by municipal sewer and water systems; or

MSK Comments: Note: "densities greater than 1 unit per acre" means parcels no larger than one acre. Does "municipal" include "public" systems.

(d) tier I streams or tier II streams regulated by local setback regulations adopted prior to [the effective date of this act] that prohibit all new building construction within 150 feet of streams.

MSK Comments: So if the locally adopted reg's allow building in certain areas closer than 150', even if based on "peer reviewed" science (see Section 9(2)(b), page 8), they are not exempt and the new setbacks in this bill apply. Not much of an exemption.

(2) Changes after [the effective date of this act] to local setback regulations adopted prior to [the effective date of this act] must comply with [sections 1 through 10].

MSK Comments: Does then any change in the previously adopted reg's, a name change for example, trigger mandatory compliance?

NEW SECTION. Section 5. Requirements for setbacks and vegetative buffers. (1) Along either side of a tier I stream, there must be a setback of at least 250 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 100 feet.

(2) Along either side of a tier II stream, there must be a setback of at least 150 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 50 feet.

(3) Within vegetative buffers, native vegetation must be maintained or enhanced, although weed control is permitted.

MSK Comments: How is "native vegetation" defined? See also my question

regarding "undisturbed" above in Section 3.(7), page 4.

NEW SECTION. Section 6. Uses within setback -- authorization. (1) Except as provided in [section 8], the following uses are prohibited within setbacks:

- (a) any type of new building, including new residential, commercial, or industrial structures, or outbuildings such as a garage or shop;
- (b) the installation of a manufactured or prefabricated building;
- (c) new septic tanks and septic tank drain fields;
- (d) an addition to an existing building of more than 50% of the square footage of the existing structure; or
- (e) the construction of a new parking lot or road except when necessary to cross a river or stream.

(2) The following uses are authorized in a setback:

- (a) the lawful use of land or buildings that existed on or before [the effective date of this act];

MSK Comments: Note that a lawful "use" of an existing building is allowed - not lawful "construction" of a new building.

- (b) any use conducted on property subject to a hydroelectric project license issued by the federal energy regulatory commission or otherwise located within the licensed project boundary as determined by the federal energy regulatory commission;
- (c) agricultural uses, except any use that includes a new building serviced by electricity, water, and sewer;

MSK Comments: Note that exempt ag buildings may not have the three utilities present. Two out of the three I guess is OK.

- (d) structures and equipment used to collect and transport water from a river or stream for agricultural or industrial uses, including diversion and intake structures, pipes, pumps and pumphouses, and related equipment; and
- (e) limited filling for highway, street, and railroad embankments not associated with stream crossings if:
 - (i) reasonable alternative transportation routes outside the setback are not available; and
 - (ii) any encroachment is located as far from the stream channel as possible;

MSK Comments: I'll check MDOT and see if this "limited filling" restriction in subsection (e) is going to be a problem. There are a lot of state roads along waterways.

and

(f) repair and improvement of existing roads within the setback.

NEW SECTION. Section 7. Political subdivision administration --

requirements -- fees. (1) Before January 1, 2008, any political subdivision that has tier I streams or tier II streams within its boundaries and is subject to [section 4] must implement a permit or certification program for new construction to ensure that the requirements of [sections 1 through 10] are met.

(2) A political subdivision may charge a fee to cover the costs of implementing the requirements of [sections 1 through 10].

MSK Comments: None needed.

NEW SECTION. Section 8. Variances. (1) A political subdivision may establish criteria for granting variances for uses that otherwise would not be allowed pursuant to [section 6].

MSK Comments: "May" establish a variance process? I think a variance process is absolutely required to make the regulation legal.

(2) An application for a variance must include information that the political subdivision considers necessary to evaluate the variance request, including but not limited to a scientific flood plain analysis, plans, maps, and specifications detailing the request.

MSK Comments: What is a "scientific" flood plain analysis?

(3) In evaluating a variance request, the political subdivision shall consider whether the variance is:

(a) contrary to the public interest;

MSK Comments: What does "public interest" mean?

(b) necessary to prevent unnecessary hardship and will comply with the purpose of [sections 1 through 10];

MSK Comments: "Necessary to prevent unnecessary hardship"? Does that mean there's something called a "necessary" hardship? And if there is, the hardship is "necessary" to do what? And what exactly is the "purpose" of sections 1 through 10?

(c) as small as reasonably possible so that the intent of [section 2] is attained to the greatest degree possible;

MSK Comments: "Small as possible"; "greatest degree possible"; and "intent"; are too vague and ambiguous to implement consistently or fairly. Also, note how those ambiguous phrases from Section 2, including "protecting

recreational opportunities”, are now tied to the regulations.

(d) likely to adversely impact water quality;

MSK Comments: “Adverse impact” is a very low standard and includes any adverse impact no matter how small.

(e) likely to increase stream bank erosion;

(f) likely to increase flood heights or velocity; and

(g) being requested as a result of a hardship not caused by the applicant.

MSK Comments: Would that be a “necessary” or “unnecessary” hardship?

(4) The applicant for a variance has the burden of presenting a preponderance of evidence to establish that the criteria for granting a variance are met.

MSK Comments: While the burden is on the applicant to establish that the “criteria” have been met – this section does not set any actual “criteria” that the applicant can meet. It merely set outs certain “considerations” for the local government. See, for example, subsection (3), page 7.

NEW SECTION. Section 9. Local setback standards in lieu of state

standards. (1) A political subdivision may enact local setback standards in lieu of state standards that comply with the policy established in [section 2(3)]. The provisions of [section 5] do not apply to tier I streams and tier II streams subject to the provisions of the local setback standards.

MSK Comments: How does one “comply with a policy”? And, regarding the exemption itself - does it mean the statewide setbacks in section 5 do not apply to local regulations adopted under this section or do not apply to any local setback standards? If it’s the latter, then every local government can adopt their own reg’s anytime they want and be exempt from this act.

(2) Local setback standards adopted pursuant to this section must:

(a) apply to the entire length of the stream within the jurisdiction of the political subdivision;

MSK Comments: Does mean that the same setback, i.e., distance, has to apply to the entire length of the watercourse?

(b) include setbacks based on peer-reviewed science and local conditions that ensure that the prohibited uses in [section 6] do not occur within at least three of the following areas:

MSK Comments: It’s true that a “peer reviewed” scientific requirement allowing local governments to deviate from state standards already exists, see

for example, 76-3-511. But in that case, the issue is measurable and quantifiable water quality standards not the incredibly site-specific issue of stream side setbacks. If a hydrologist goes out to a specific location and determines that 50 feet is fully protective – how can that determination get “peer reviewed”?

- (i) wetlands adjacent to streams;

MSK Comments: How is “wetlands” defined.

(ii) a 100-year flood plain as determined by either the federal emergency management agency or the department of natural resources and conservation or, in the absence of a designation, a flood plan analysis adopted by a political subdivision;

(iii) areas where it is reasonably possible that an active channel of the stream could migrate in the next 100 years because of erosion or avulsion; or

MSK Comments: How is “reasonably possible” defined?

- (iv) areas of steep slopes adjacent to the stream or its flood plain;

MSK Comments: How is “steep slopes” defined?

(c) include vegetative buffers that, based on peer-reviewed science and local conditions, prevent unnatural rates of erosion and sedimentation, protect water quality, and maintain native riparian vegetation.

MSK Comments: What’s an “unnatural rate of erosion”? See also my concerns regarding “peer reviewed” in Section 9 (2)(b), page 8.

(3) A political subdivision may adopt local setback standards for any perennial, intermittent, or ephemeral streams within its jurisdiction.

MSK Comments: I think they have this authority already under zoning and probably subdivision authority.

NEW SECTION. Section 10. Enforcement -- penalties. (1) The proper authorities of the political subdivision, in addition to other remedies, may institute any appropriate action or proceeding to ensure that a person who commences a prohibited use after January 1, 2008, without certification by a political subdivision or a variance shall restore the waterside management corridor to its original condition before the person disturbed it.

MSK Comments: The term “proper authorities”, while archaic, is already used in the zoning codes.

(2) The political subdivision may appoint enforcing officers to supervise and enforce the provisions of [sections 1 through 10].

(3) A knowing violation of [sections 1 through 10] or any regulation adopted pursuant to [sections 1 through 10] is a misdemeanor punishable by a fine not to exceed \$500 a day.

NEW SECTION. Section 11. Notification to tribal governments. The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell Chippewa tribe.

MSK Comments: Why?

NEW SECTION. Section 12. Codification instruction. [Sections 1 through 10] are intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to [sections 1 through 10].

NEW SECTION. Section 13. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

MSK Comments: Therefore, if a local government, say for example Ravalli County, has been working on this issue for almost two years, and this bill is signed into law in April, Ravalli will not be exempt and may not impose its own regulations unless they fit the exemption criteria found in Section 9, page 8..

NEW SECTION. Section 14. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 15. Effective date. [This act] is effective on passage and approval. ***MSK Comments: See my comments regarding the immediate effect date, Section 13, this page.***

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